MARKCON SDN. BHD. (IN LIQUIDATION)

v.

RESILIENT CONSTRUCTION SDN. BHD. AND LABTEC SDN. BHD. & ANOR. (OPPOSING CREDITORS)

HIGH COURT, JOHOR BAHRU
DATO' JAMES FOONG J.
[COMPANIES WINDING-UP NO. 28-5 OF 1990]
17 JULY 1993

PRACTICE AND PROCEDURE: Liability of liquidators for costs - Liquidator brought petition on behalf of petitioner for winding up of respondent - Petition dismissed and costs awarded against liquidator - Whether liquidator personally liable - Circumstances where liquidators could be personally liable for costs.

The petitioner in this case brought a petition to wind up the respondent. At the material time the petitioner themselves were in liquidation and therefore their actions were carried out on their behalf by the liquidator. The petition was dismissed with costs. The Judgement Order awarded the said costs in the following terms:

> It is ordered that the winding up presented by the Liquidator of the Petitioner on the 25 February 1990 herein be dismissed with costs to be paid by the Liquidator of the Petitioner to the Respondent and the opposing creditors.

The opposing creditors applied for an order that costs as awarded in the Judgement Order be costs due and paid by the liquidator personally.

Held:

[1] The law as it now stands is that when a liquidator who does not sue or defend in his own name but that of a company, any costs awarded should be that of the company. The Court, however, has a discretion by way of awarding costs personally against the liquidator or persons of such likes as a sanction for instituting unnecessary proceedings or incurring unnecessary litigious expenses or where there is a misconduct or fault or error on the part of the liquidator in bringing such proceedings.

[2] There is no evidence that the liquidator had brought the petition unnecessarily or had incurred unnecessary expenses or whose action need to be sanctioned. It is therefore not justifiable to rule that the Judgement Order for "costs to be paid by the liquidator of Petitioner" to mean the liquidator is personally liable for such costs. The costs in this case should be that of the company.

[Application of opposing creditors dismissed].

Cases referred to:
Zainal Abidin Putih & Anor. v. Che Wan Development Sdn. Bhd. [1992] 2 MLJ 233 ***(refd)***
Re Wilson & Sons Ltd. [1977] 1 All ER 274 ***(refd)***

Other sources referred to:
Companies Acts, Buckley, Vol. 1, 14th Edn., p. 600

For the opposing creditors - K.L. Wong; (M/s. K.L. Wong & Co.)
For the liquidator - Ong Ban Chai; (M/s. Ong Ban Chai & Co.)

JUDGMENT

James Foong J:

This is an application (Enclosure 46) by two opposing creditors for an order that costs awarded in a Judgement Order dated 10 December 1990 be costs due and paid by the liquidator personally. The costs as taxed by the Registrar amounts to RM10,222.50 inclusive of the allocature fee of RM764.00. This matter arose from a petition brought by the petitioner to wind up the respondent. At that material time, the petitioners themselves were in liquidation and therefore their actions were carried out by the liquidator. On 10 December 1990 justice Datuk L.C. Vohrah dismissed the winding up petition of the petitioner and awarded costs in the manner as contained in the Judgment Order:

> **It is ordered** that the winding up petition presented by the liquidator of the petitioner on 25 February 1990 herein be dismissed with costs to be paid by the liquidator of the petitioner to the respondent and the opposing creditors.

Counsel for the liquidator of the petitioner now argued that the liquidator should not be personally liable to costs as an he acted as officer of the Court in the capacity as liquidator for the petitioner when the winding up petition was brought. To support his contention, Counsel for the liquidator quoted a passage in Buckley on the **Companies Acts** Vol. 1, 14th Edn. at p. 600 that:

> ... when the liquidator does not sue or defend in his own name but in that of the company,

there is no jurisdiction to order the liquidator who is not a party litigant to pay costs, any more than directors of a going company could be ordered to pay costs.

Further, I am informed by the liquidator's Counsel that the petitioner is in no position to pay anyone any costs due to a lack of funds.

Counsel for the opposing creditors who are now claiming for costs from the liquidator personally, submitted to me a number of authorities, two of which I find some assistance to the issue in this case.

The first is the Supreme Court decision in *Zainal Abidin Putih & Anor. v. Che Wan Development Sdn. Bhd.* [1992] 2 MLJ 233 where Justice Tan Sri Gunn Chit Tuan (as he then was) ruled that the High Court has a discretionary power to grant costs. To this he states as follows:

> We would agree therefore that *Bacal Contracting Ltd v. Modern Engineering (Bristol) Ltd. & Ors.* [1980] 2 All ER 655 is the modern illustration of the general principle that courts could use the sanction of an adverse order in costs against a receiver. But our present case was not one of which the appellants, as receivers, had caused unnecessary proceedings or litigious expenses.

Though the aforesaid case involves a receiver and not a liquidator, I find that the principles enunciated therein can similarly be applied to a liquidator.

An English authority more directly on point which relates to whether a liquidator is liable to costs personally is *Re Wilson & Sons Ltd.* [1977] 1 All ER 274. Oliver J. after examining a whole series of authorities then existing, ruled that the liquidator was personally liable to pay the costs. In *Re Wilson & Sons Ltd.*, the liquidator acting as liquidator for a company in liquidation brought an action against its former directors and a bank on charges of fraud. Part of the claim was abandoned midway through the hearing while the remainder was finally dismissed. Oliver J. has this to say when awarding costs against the liquidator personally:

> It seems to me to be quite wrong now that he should then turn round and say I have agreed to pay costs on a common fund basis but I only agreed to pay them out of assets which I have not got. That seems to be a total negation of justice even were I convinced, which I am certainly not, that the rule is as Counsel for the liquidator suggest that it is.

After careful perusal of the authorities cited, I am of the opinion that the law as it now stands is that when a liquidator who does not sue or defend in his own name but that of a company, any costs awarded should be that of the company. However, as justice Tan Sri Gunn Chit Tuan has expressed in Zainal Abidin Putih's case, the Court is given a discretion by way of awarding costs personally against the liquidator or persons of such likes as a sanction for instituting unnecessary proceedings or incurring unnecessary litigious expenses. To my mind this sanction should equally apply to cases where there is misconduct or fault or error on the part of the liquidator in bringing such proceedings.

Now let us examine the Judgment Order date 10 December 1990. The expression used therein is, "paid by the liquidator of the petitioner". Does this mean that the learned Judge desire to sanction the liquidator personally? It is rather unfortunate that this application is not heard by justice Datuk LC Vohrah, the trial Judge who dismissed the petition. To my mind the trial Judge who heard the petition would be in a better position to determine whether the petition was brought unnecessarily or had caused unnecessary litigious expenses. If so, the liquidator would personally have to bear the costs. However, I had the opportunity to read the written judgment of Justice Datuk LC Vohrah which is attached as an exhibit in an affidavit filed in support of this application. From it, I do not find any statement or expression from the learned Judge that stress on the fact that such a petition was unnecessary or had caused unnecessary expenses nor had the learned Judge in any way viewed the liquidator's action as a misconduct or fault or error in bringing the petition for whose action should be sanctioned. In fact, in the said written judgment itself relating to the question of costs, the learned Judge has only this to say: "For the above reasons I dismissed the petition with costs." It is only when the Order was extracted that it contained the words, "be dismissed with costs to be paid by the liquidator of the petitioner ...

From the aforesaid, I am unable to find without further evidence that the liquidator had brought the petition unnecessarily or had incurred unnecessary litigious expenses or whose action need to be sanctioned. It is therefore not justifiable to rule that the Judgment Order for "costs to be paid by the liquidator of petitioner" to

mean the liquidator is personally liable for such costs. Following the general rule that the liquidator does not sue or defend in his own name but that of the company, the costs in this case should be that of the company. As I have stated aforesaid, this general principle is subject to exceptions as stated aforesaid but in the absence of evidence to the contrary, I have to dismiss this opposing creditors' application.

For this application I shall not award costs to any party.

MAYBAN FINANCE BHD.

v.

AIK SOON AUTO SDN. BHD. (FORMERLY KNOWN AS AIK SOON AUTO FINANCE SDN. BHD.) & 4 ORS.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[SUIT NO. D2-22-1752-91]
9 JULY 1993

CONTRACT: Block discounting agreement - Construction - Whether agreement an agreement to agree or a binding contract - Whether agreement enforceable.

INTERPRETATION OF STATUTES: Agreement void under repealed statute - Agreement made enforceable by repealing statute - Repealing statute having retrospective effect - Whether agreement validated - Finance Companies Act 1969, s. 2 - Banking and Financial Institutions Act 1989, ss. 127, 128.

HIRE-PURCHASE: Defendant executed hire-purchase agreements with third parties - Plantiff purchased en-bloc defendant's contractual rights - Third parties did not execute exclusive assignment of hire-purchase properties to plaintiff - Whether plaintiff's rights to title of hire-purchase properties adversely affected - Whether guarantors in hire purchase agreements prejudiced.

LOCUS STANDI: Agreement executed under plaintiff's old name - Plaintiff sued under its new name - Change of name not pleaded in statement of claim - Defendant questioned locus of plaintiff but did not enter appearance to strike out writ - Whether objection a non-issue.

The plaintiff in this case was formerly known as Malayan Finance Corporation Berhad. While under this entity the plaintiff entered into a block discounting agreement (the master agreement) with the first defendant, a company carrying the business of auto trade. By the master agreement, to which the second defendant was a guarantor, the plaintiff purchased the contractual rights of the first defendant in hire-purchase agreements which the first defendant had with the various hirers. However, as between the plaintiff and the hirers, no exclusive assignment of the hire purchase properties had been executed.

In the meanwhile the plaintiff shed off its old corporate name in favour of the present name,